No. 87-2034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACQUELINE BARBERA, as Administratrix of the Goods, Chattels, and Credits of Lena Margaret Barbera,

Petitioner,

v.

STEPHEN SCHLESSINGER, individually and in his official capacity as a former United States Attorney for the Southern District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Jacqueline Barbera

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Question Presented

Did respondent Assistant United States Attorney have a duty that was clearly established in 1981-1982 to protect the decedent, a cooperating witness who was murdered, after the AUSA created a specific danger to her by naming her as an informant to the target of the federal investigation?

Parties

Plaintiff-Petitioner is Jacqueline Barbera, as Administratrix of the Goods, Chattels and Credits of Lena Margaret Barbera.

Defendant-Respondent is Stephen Schlessinger, individually and in his official capacity as a former Assistant United States Attorney for the Southern District of New York.

In addition, John S. Martin, Jr., individually and in his official capacity as a former United States

Attorney for the Southern District of New York was a defendant in the district court and an appellant in the court of appeals. The dismissal of the complaint against him is not challenged herein.

In addition, William French Smith, individually and in his official capacity as a former Attorney General of the United States, was a defendant in the district court. The dismissal of the complaint against him was not appealed to the court of appeals and is not challenged herein.

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Statutes

Constitutional Provisions

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit in Barbera v. Smith is not yet published. The slip opinion is annexed hereto at 1a.

The opinion of the United States District Court for the Southern District of New York in Barbera v. Smith is published at 654 F.Supp. 386

(S.D.N.Y. 1986), and is annexed hereto as 16a.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 30, 1987.

A petition for rehearing and suggestion of rehearing en banc was timely filed and denied by order entered on February 16, 1988. On May 10, 1988, the Hon. Thurgood Marshall signed an order extending petitioner's time to file a petition for a writ of certiorari up to and including June 14, 1988.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. Sec. 1254.

Constitutional Provisions Involved

The Fifth Amendment to the Constitution provides, in pertinent part, "No person shall be . . .

deprived of life, liberty, or property without due process of law . . ."

Statement of the Case

A. Statement of Facts

On April 12, 1982, Lena Margaret Barbera was abducted from the rooftop parking area at Pier 92, in Manhattan, and later shot to death. Three CBS employees who were in the vicinity heard Ms. Barbera's cries for help and came to her aid. They, too, were murdered.

Donald P. Nash, a contract killer, and Irwin E. Margolies, a convicted diamond swindler and former president of the Candor Diamond Corporation were eventually charged with and convicted of the murders. In the course of their trials, it became clear that the murders were provoked and assisted by the most unlikely source -- the officce of the United States Attorney for the

Southern District of New York.

Ms. Barbera was employed by Candor Diamond Corporation as an accountant. Candor, its employees, and Margolies were the targets of a federal grand jury probe in the Southern District of New York during 1981 and 1982. The investigation centered on a complex mail fraud scheme, of which Margolies appeared to be the mastermind and chief beneficiary. The Assistant United States Attorney in charge of the investigation was the defendant, Stephen Schlessinger.

In late 1981, after discussions with Schlessinger, Barbera agreed to become a cooperating witness for the Government. In exchange for her undercover work and her anticipated testimony at trial, Schlessinger permitted her to plead guilty to a single-count indictment for fraud, and

promised to recommend a non-custodial sentence. Schlessinger also was using a former employee of Candor, one Gaye Broffman, as an informant.

After Ms. Barbera began cooperating with the Government, her attorney, James R. Coley, asked Schlessinger to provide police protection to Barbera. He refused. In December, 1981, for reasons that have never been explained, Schlessinger informed Henry Oestericher, one of Margolies' attorneys, that two Candor employees were cooperating with the Government. Schlessinger specifically named Barbera as one of the witnesses.

Almost immediately thereafter, Oestericher informed Margolies, and the two began to plan the murder of Barbera and her unnamed friend. Margolies erroneously assumed that the other worker was one Jenny Soo Chin, a co-

worker and close friend of Barbera's. In December, 1981, Margolies met with contract killer Donald Nash, and paid an initial $2,000.00 down payment for the murders of Barbera and Chin.

In January, 1982, Jenny Soo Chin disappeared. Her body was never found, but Nash displayed a gruesome photo of her body to Margolies as proof that the "contract" had been carried out.

Following the disappearance of Chin, Barbera again begged Schlessinger for protection. Again, he refused. Schlessinger never even informed Barbera that he had revealed her name as a cooperating witness. Shortly after the last plea for protection, Barbera was murdered.

B. Procedural History

Plaintiff's estate commenced a constitutional tort action brought pursuant to Bivens v. Six Unknown Named

Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), for the wrongful death of Lena Margaret Barbera in violation of the due process clause of the fifth amendment. The complaint named as defendants William French Smith, the former Attorney General of the United States, John S. Martin, Jr., the former United States Attorney for the Southern District of New York, and Stephen Schlessinger, a former Assistant United States Attorney.

In the District Court for the Southern District of New York, Shirley Wohl Kram, Judge, the complaint was dismissed as to former Attorney General Smith for lack of personal jurisdiction. 654 F.Supp. 386, 392 (S.D.N.Y. 1987). That dismissal was not appealed.

Defendants Martin and Schlessinger asserted their entitlement to

prosecutorial immunity and moved to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment. The district court denied the motion, and, as modified by an order ddated April 1, 1987, certified for interlocutory appeal pursuant to 28 U.S.C. Sec. 1292(b) its rulings that the complaint states a claim upon which relief can be granted and that summary judgment should be denied.

Appellants appealed as of right to the United States Court of Appeals for the Second Circuit from the denial of their claims of qualified immunity, and the Court of Appeals simultaneously gave them permission to appeal from the certified rulings pursuant to 28 U.S.C. Sec. 1292(b). The Court of Appeals found that the allegations of reckless misconduct against defendant Martin

failed to state a cause of action. Petitioner does not seek review of that ruling. The Court of Appeals also held that defendant Schlessinger was entitled to qualified immunity because it was not clearly established in 1981-1982 that Schlessinger owed a duty of protection to Barbera.

The United States Court of Appeals for the Second Circuit denied plaintiff's petition for rehearing and suggestion of rehearing en banc on February 16, 1988.

Upon timely application to Hon. Thurgood Marshall, plaintiff's time to file this Petition for Writ of Certiorari was extended up to and including June 14, 1988.

Reasons for Granting the Writ

THE CASE LAW REGARDING THE CREATION OF A SPECIAL RELATIONSHIP WAS SUFFICIENTLY CLEAR IN 1981-82 TO IMPOSE LIABILITY ON SCHLESSINGER.

The "special relationship" doctrine

-- which imposes a duty of protection on government officials -- had been part of the law of constitutional torts since 1976. In Estelle v. Gamble, 429 U.S. 97 (1976), this Court held that prison officials may be held liable for constitutional torts for failure to provide medical care to prison inmates. The reasoning of the case was clear, straightforward, and applicable to a variety of other circumstances. Indeed, in Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), the Second Circuit Court of Appeals extended the rule of Estelle to situations where the government had assumed a duty of care but not actual, physical custody.

This Court again spoke on this issue in 1980. In Martinez v. California, 444 U.S. 277 (1980), this Court dismissed a civil rights claim filed by

the family of a woman slain by a parolee. The Court found that, under the specific circumstances of the case, the Parole Board could not be held liable for the parolee's actions. Far from offering "vague hints" as to when liability would attach, Martinez provided fairly specific standards by which future cases could be (and have been) judged. The Martinez Court noted that the parolee's actions, coming some five months after his release, were too remote a consequence of the Board's actions -- applying familiar principles of proximate cause. 444 U.S. at 285, citing, Palsgraf v. Long Island Railroad Company, 248 N.Y. 339 (1928). Further, this Court found that "the parole board was not aware that appellant's decedent, as distinguished from the public at large, faced any special danger." Id. Hence, in

situations where proximate cause did exist, and the defendant knew that his actions created a danger to a specific person or class of persons, liability would attach. Charging Schlessinger with the responsibility, as a federal prosecutor, to make this simple deduction hardly seems to impose an undue or unfair burden upon Assistant United States Attorneys. See also, White v. Rochford, 592 F.2d 381 (7th Cir. 1979)(A cause of action was stated against the police where they arrested the driver of an automobile, then left children alone in the car); Wagar v. Hasenkrug, 486 F.Supp. 47 (D. Mont. 1980)(Police arrested intoxicated individual then left him in the park, where he died from pancreatis).

These cases clearly established, by late 1981, that when the government engages in action that deprives an

individual of his ordinary ability to protect himself, or engages in actions which create special dangers to specific individuals, the government has a concomitant responsibility to provide protection. Failing to discharge this duty gives rise to a constitutional tort claim against the delinquent official, as long as proximate cause is proven.

By permitting Schlessinger to evade the clear meaning of these cases, the Court of Appeals permits him a "free" constitutional violation. Moreover, by expressing doubt as to whether, even today, Barbera would be entitled to protection or warning, the Court of Appeals sets the stage for future tragedies.

In Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), the Court of Appeals for the Seventh Circuit issued

a clear warning:

> [Defendant] cannot hide behind a claim that the particular factual tableau in question has never appeared in haec verba in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a [prosecutor] may not take solace in ostrichism.

The perils of exposing informer's identities have been known for millenia. Any child with sufficient intelligence to flip a TV switch finds out what happens when the police fail to protect their informers. Schlessinger embarked upon a monstrously reckless course of action which caused the deaths of five people. He should be held accountable for his actions.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States District Court for the Second Circuit.

Dated: New York, N.Y.
June 14, 1988

Respectfully submitted,

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* Counsel wish to thank Michael L. Jackson, a third year student at the University of Buffalo School of Law, and Joan L. Washington, a paralegal, for their invaluable help in the preparation of this petition.

APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 3, 4—August Term, 1987

(Argued: August 31, 1987

Decided: December 30, 1987)

Docket Nos. 87-6054, 87-6098

JACQUELINE BARBERA, as Administratrix of the Goods, Chattels, and Credits of Lena Margaret Barbera,

Plaintiff-Appellee,

—v.—

WILLIAM FRENCH SMITH, individually and as the former Attorney General of the United States; JOHN S. MARTIN, JR., individually and as the former United States Attorney for the Southern District of New York; and STEPHEN SCHLESSINGER, individually and as a former Assistant United States Attorney for the Southern District of New York,

Defendants,

JOHN S. MARTIN, JR., and STEPHEN SCHLESSINGER,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge*,
PIERCE and ALTIMARI, *Circuit Judges*.

Interlocutory appeal from an order of the United States District Court for the Southern District of New York (Kram, *J.*) denying defendants' motion to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment.

Reversed and remanded with instructions to dismiss.

WILLIAM M. KUNSTLER, Esq., New York, N.Y. (Ronald L. Kuby, New York, N.Y., of counsel), *for Plaintiff-Appellee*.

PETER C. SALERNO, Assistant United States Attorney, New York, N.Y. (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Steven E. Obus, Assistant United States Attorney, New York, N.Y., of counsel), *for Defendants-Appellants*.

PIERCE, *Circuit Judge*:

This is a constitutional tort action brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal*

Bureau of Narcotics, 403 U.S. 388 (1971), for the wrongful death of Lena Margaret Barbera in violation of the due process clause of the fifth amendment. The complaint named as defendants William French Smith, the former Attorney General of the United States, John S. Martin, Jr., the former United States Attorney for the Southern District of New York, and Stephen Schlessinger, a former Assistant United States Attorney. In the District Court for the Southern District of New York, Shirley Wohl Kram, *Judge*, the complaint was dismissed as to former Attorney General Smith for lack of personal jurisdiction. 654 F. Supp. 386, 392 (S.D.N.Y. 1987). That dismissal is not before us in the present appeal. Defendants Martin and Schlessinger asserted their entitlement to prosecutorial immunity and moved to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment. The district court denied the motion, and, as modified by an order dated April 1, 1987, certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) its rulings that the complaint states a claim upon which relief can be granted and that summary judgment should be denied. Appellants appeal as of right from the denial of their claims of immunity, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), and this Court granted them permission to appeal simultaneously from the certified rulings pursuant to 28 U.S.C. § 1292(b). The two appeals were consolidated, and, finding that the complaint's allegations of negligence fail to state a claim for relief against either defendant, that the allegations of recklessness fail to state a claim against defendant Martin, and that defendant Schlessinger is entitled to qualified but not absolute immunity from suit, we now reverse.

BACKGROUND

In 1981, the United States Attorney's Office for the Southern District of New York, then headed by John S. Martin, Jr. ("Martin"), was investigating the bankruptcy of Candor Diamond Corporation ("Candor") for possible fraud committed by it, by its president, Irwin Margolies ("Margolies"), and by its employees. The investigation was led by then Assistant United States Attorney Stephen Schlessinger ("Schlessinger"). In the course of this investigation, the government sought and eventually secured the cooperation of Lena Margaret Barbera ("Barbera"), an accountant who had been employed as Candor's comptroller and who was believed to have knowledge of some of its then suspected fraudulent acts. In exchange for her cooperation, Barbera was permitted to plead guilty to a single-count information charging her with fraud, and the United States Attorney's Office promised to make no recommendation with respect to the sentence to be imposed. The complaint alleges that during the course of the government's dealings with Barbera, Barbera's attorney requested that Schlessinger arrange for police protection for her, as she allegedly feared that her cooperation with the government "might result in physical harm or death to her." This request was denied for reasons not known to us.

In or about December 1981, during a conversation between Schlessinger and Margolies' attorney, Henry Oestericher ("Oestericher"), Schlessinger is alleged to have mentioned that Barbera and an unnamed female also employed by Candor were cooperating with the government. Oestericher is said to have passed this information on to Margolies, who hired Donald P. Nash ("Nash"), a contract killer, to murder Barbera and the

other employee. Shortly thereafter, Jenny Soo Chin ("Chin"), a former Candor employee and a close friend of Barbera, disappeared. Apparently, Margolies believed that Chin was the other cooperating witness. Although her body was never found, Nash apparently displayed a photograph of Chin's dead body to Margolies as proof that he had carried out part of their agreement.

Soon after Chin's disappearance, Barbera's attorney allegedly again requested police protection for her. Again, Schlessinger denied the request. On April 12, 1982, Barbera was abducted from the rooftop parking area at Pier 92 in Manhattan and was later shot to death. Three employees of CBS Inc. were also killed when they attempted to come to her aid. Margolies and Nash were eventually convicted in New York state court of Barbera's murder.

This *Bivens* action was brought in July 1984 in the United States District Court for the Eastern District of New York by Jacqueline Barbera, as administratrix of Barbera's estate, to recover damages for the allegedly negligent and reckless acts of Martin and Schlessinger, which allegedly caused Barbera to be wrongfully deprived of her right to life in violation of the due process clause of the fifth amendment to the Constitution. The action was transferred to the Southern District of New York shortly thereafter.

In May 1985, Martin and Schlessinger moved in the alternative for summary judgment or to dismiss the complaint on the ground that, *inter alia*, it failed to state a claim for relief. In particular, they asserted that they are entitled to both absolute and qualified immunity from suit for actions taken in the course of their official duties.

Judge Kram rejected their claims and these appeals followed.

DISCUSSION

I. FAILURE TO STATE A CLAIM

The complaint charges the defendants with depriving Barbera of her right to life in violation of the due process clause of the fifth amendment. As to Martin, the complaint merely alleges in conclusory language that he negligently and recklessly failed to train and supervise Schlessinger adequately. It does not allege any personal involvement by Martin in the decisions to reveal Barbera's identity and to deny her protection. Nor does it allege that Martin created or acquiesced in a policy or practice of poor training and supervision of subordinate Assistant United States Attorneys. Nor does the complaint plead any other facts sufficient to support an inference that Martin was *reckless* in managing his subordinates. Consequently, we must conclude that, in this respect, the complaint fails to state a claim for relief with respect to Martin. *See Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986); *Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir.) (citing *Rizzo v. Goode*, 423 U.S. 362 (1976)), *cert. denied*, 444 U.S. 980 (1979).

The allegations of *negligence* with respect to both Martin and Schlessinger fail for a different reason. Insofar as the complaint charges them with negligently depriving Barbera of her right to life, it fails to state a constitutional claim. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

The remaining allegation charges Schlessinger with a reckless constitutional violation. In *Daniels*, the Supreme

Court explicitly left open the question of whether grossly negligent or reckless conduct would be sufficient to allege a constitutional violation. 474 U.S. at 334 n.3. We find no occasion to address that question here, however, because we resolve this claim on grounds of immunity.

II. IMMUNITY

We are asked to determine herein whether a prosecutor is immune from suit for revealing a witness' identity to the subject of a potential prosecution, and for refusing to provide police protection for that witness. We conclude, upon the facts presented, that he is not absolutely immune, but that qualified immunity does attach.

A. *Absolute Immunity*

It is firmly established that prosecutors are entitled to absolute immunity from suits for damages arising from activities that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *see Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987). This protection encompasses "all of their activities that can fairly be characterized as closely associated with the conduct of litigation or potential litigation . . . ." *Barrett v. United States*, 798 F.2d 565, 571-72 (2d Cir. 1986). But when a prosecutor performs an investigative or administrative function rather than a prosecutorial one, absolute immunity is not available. *Powers v. Coe*, 728 F.2d 97, 103-04 (2d Cir. 1984); *Taylor v. Kavanagh*, 640 F.2d 450, 452 (2d Cir. 1981).

It is not at all clear what actions are so closely related to a prosecution as to come within the ambit of absolute immunity. We have previously held that a prosecutor is absolutely immune with respect to a decision whether or

not to prosecute, *Dacey v. Dorsey*, 568 F.2d 275, 278 (2d Cir.), *cert. denied*, 436 U.S. 906 (1978); *see also Atkins v. Lanning*, 556 F.2d 485, 488 (10th Cir. 1977) (district attorney immune from suit for naming wrong person in arrest warrant); *Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984). Such protection also applies to the conduct of actual litigation, *Lee v. Willins*, 617 F.2d 320, 322 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980), including the presentation of evidence to a grand jury, *Maglione v. Briggs*, 748 F.2d 116 (2d Cir. 1984) (per curiam), and the conduct of a plea bargain, *Taylor v. Kavanagh*, 640 F.2d at 453.

Absolute immunity is not available, though, when a prosecutor undertakes conduct that is beyond the scope of his litigation-related duties. Thus it does not apply when the prosecutor releases information or evidence to the media, *Powers v. Coe*, 728 F.2d at 103, authorizes or directs the use of wiretaps, *id.*, assists in the execution of a search or seizure, *see Robison v. Via*, 821 F.2d 913, 918-19 (2d Cir. 1987); *Hampton v. Hanrahan*, 600 F.2d 600, 632 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980), or engages in personal activities totally unrelated to his assigned duties, *see Harper v. Merckle*, 638 F.2d 848, 859 (5th Cir.) (no immunity for judge who misuses power of office to assist friend in case not pending before him), *cert. denied*, 454 U.S. 816 (1981). None of these tasks is sufficiently closely related to the litigation function for which the common law immunity doctrine was developed.

While we have previously stated that prosecutorial immunity extends to actions involving potential, as well as actual litigation, *see Barrett v. United States*, 798 F.2d at 571-72, we also have said that a prosecutor's investiga-

tive duties are not covered by this protection. *See Powers v. Coe*, 728 F.2d at 103-04; *Taylor v. Kavanagh*, 640 F.2d at 452. We have not previously addressed the question of whether the evidence-analyzing and case preparation functions performed by a prosecutor before the actual filing of an information or indictment constitute prosecutorial or investigative tasks. *See also Imbler*, 424 U.S. at 431 n.33 (open question). We note that in each of the cases we have reviewed where absolute immunity was upheld, some type of formal proceeding had been commenced or was being commenced by the challenged acts. *See, e.g., Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 678 (9th Cir. 1984) (defendant arrested but not indicted; prosecutor absolutely immune from suit for destruction of exculpatory evidence). Conversely, where no proceedings have begun, qualified immunity is the norm. *See, e.g., Barrett v. United States*, 798 F.2d at 573 (federal attorneys who advised state attorneys in suit against state entitled only to qualified immunity because federal government was only prospective defendant); *see also Austin v. Borel*, No. 86-4762 (5th Cir. Nov. 4, 1987) (social worker not entitled to absolute prosecutorial immunity for filing verified complaint in support of petition used by district attorney to commence legal proceedings).

We do not intend to establish a bright line commencement-of-proceedings test, *see also Powers v. Coe*, 728 F.2d at 104 (bright lines avoided in prior decisions), and we are mindful of the Supreme Court's admonition that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom . . . . Preparation, both for the initiation of

the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Imbler*, 424 U.S. at 431 n.33. Nevertheless, as we discuss below, we find the conduct in this case to be more closely linked to the prosecutor's investigative duties than to his role as government litigator.

As we see it, the pre-litigation function that a prosecutor performs has at least two aspects: (1) the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution, and (2) the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order. While both of these categories of activities occur before the commencement of formal legal proceedings, and therefore may be loosely termed "investigative," we believe that the first category consists of actions that are of a police nature and are not entitled to absolute protection, *see, e.g., Powers v. Coe*, 728 F.2d at 103, 104; *Robison v. Via*, 821 F.2d at 918-19. We express no view with respect to the second category because we find that the conduct in this case falls within the ambit of law enforcement supervision and the gathering of evidence.

The record indicates that Schlessinger was assigned to *investigate* Margolies and Candor in or about July 1981 with a view towards the possibility of prosecuting them and their employees for fraud and other offenses. Schlessinger Decl. ¶ 2; *see also People v. Margolies*, 125 Misc. 2d 1033, 1034-35, 480 N.Y.S.2d 842, 844 (N.Y. Sup. Ct. 1984). In the course of this investigation, the government sought and eventually obtained the cooperation of Barbera, *see* Schlessinger Decl., Exh. A, who agreed to testify against Margolies and Candor before a federal

grand jury. *See id.*; *People v. Margolies*, 125 Misc. 2d at 1035, 480 N.Y.S.2d at 845. During the course of the investigation, in December 1981, and prior to reaching a formal cooperation agreement with Barbera, which was not finalized until March 1982, Schlessinger is alleged to have had occasion to speak with Margolies' attorney, Oestericher, at which time Barbera's cooperation was apparently discussed. The record does not reveal why Barbera's identity was allegedly disclosed, and we note that Schlessinger's affidavit only indicates in the most general terms that any discussion with Margolies' counsel pertained to a "potential prosecution of Irwin Margolies." Schlessinger Decl. ¶ 4.

Even if, as the government hints in its brief, Schlessinger was trying to "induc[e] the target himself to cooperate," we are led to conclude from the record as a whole that the government was still actively pursuing its investigation, and was not yet engaged in the process of prosecuting a criminal defendant. Nor had the process of prosecution begun when, in or about January 1982, Schlessinger is alleged to have twice refused to arrange for police protection for Barbera. Indeed we note from the public records of the district court in which Margolies was eventually charged with various counts of mail and tax fraud as a result of this investigation that an arrest warrant was not issued for him until May 4, 1982, and that he was not indicted until June 3, 1982.

By contrast, in late 1981 and early 1982, at the time of the alleged disclosure of Barbera's identity and the refusal to provide her with police protection, the government was still seeking evidence, including testimony from witnesses such as Barbera, that would enable it to prosecute Margolies and others involved in Candor's fraudulent acts. We

do not believe that this task was so "intimately associated with the judicial phase of the criminal process" as to fall within the *Imbler* dicta that some of a prosecutor's investigative functions may be entitled to absolute immunity, *see* 424 U.S. at 431 n.33. Although we do not foreclose that possibility in an appropriate case, Schlessinger's activities at the time of the alleged conduct herein seem to have involved primarily the directing of an investigation by police and other law enforcement personnel. Plaintiff's complaint in fact alleges, in its only reference to the scope of Schlessinger's duties, that he "had primary responsibility for the . . . investigation of Candor." As we stated in *Lee v. Willins*, 617 F.2d at 322, however, "Where the alleged harm is inflicted independently of the prosecution, . . . absolute immunity will not attach." The conduct in this case was not sufficiently linked to the court-related duties of a prosecutor to entitle Schlessinger to absolute immunity.

B. *Qualified Immunity*

Prosecutors are entitled to qualified immunity from suit if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The inquiry is one of objective reasonableness. *Id.*; *Wyler v. United States*, 725 F.2d 156, 159 (2d Cir. 1983).

The government owes a duty to protect a person from harm only if there is a "special relationship" between that person and the government. *See Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). Even today, "[t]he contours of what constitutes a 'special relationship' . . . are hazy and

indistinct." *Id.* Yet, unless it was clearly established in 1981-82 that the government owed a duty of protection to someone in Barbera's position, qualified immunity will insulate Schlessinger's actions.

The Supreme Court held in *Estelle v. Gamble*, 429 U.S. 97 (1976), a case involving medical care for prison inmates, that under some circumstances, the government would be obligated to protect the well-being of certain persons under its control. This rule was expanded in *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), to extend to persons not within the government's immediate physical control—children in foster care—to whom the government had assumed a duty of care. Its application to noncustodial situations was first addressed in *Martinez v. California*, 444 U.S. 277 (1980), where the Supreme Court concluded that the government owed no duty of protection to a person killed by a paroled inmate released from state custody. The *Martinez* Court found the injury to be too remote a consequence of the state's action for liability to attach, and it did not even reach the question of whether such a killing amounted to a constitutional violation or whether it constituted state action. *Id.* at 285 & n.11. The Court "gave only vague hints as to what circumstances, if any, might create such a special relationship and render the state liable . . . ." *Estate of Gilmore v. Buckley*, 787 F.2d 714, 721 (1st Cir.), *cert. denied*, 107 S. Ct. 270 (1986).

Based on the limited caselaw in existence at the time of Barbera's death, and particularly because of the absence of any significant caselaw on governmental duties arising from non-custodial relationships, we cannot say that it was clearly established that the government had created

or assumed a special relationship with Barbera. *See Ellsworth v. City of Racine*, 774 F.2d at 185-86 (in 1980, government owed no general duty to protect family of witness who had become the target of threats due to the witness' scheduled testimony in a criminal case). Moreover, when this Court held in 1980 that the federal courts lack subject matter jurisdiction under 28 U.S.C. § 1331 over suits to compel the government to provide protection to a cooperating witness, we strongly hinted that no such claim for relief could be stated. *See Doe v. Civiletti*, 635 F.2d 88, 89, 90 (2d Cir. 1980) (Attorney General has broad discretion in deciding whether to admit someone to Witness Protection Program; government attorneys cannot make representations on the subject). In 1981-82, it would have been speculative, at best, to conclude that Barbera was entitled to police protection, or that the government was otherwise obliged to safeguard her from those against whom she was going to testify. Certainly, these are not the types of objectively reasonable conclusions that we can infer reasonable persons, including reasonable prosecutors, would have reached. We need express no opinion on how this question would be resolved based on the caselaw as it exists today. We do conclude that Schlessinger is entitled to qualified immunity in connection with his conduct in this case, given the time of occurrence and the state of the law at the time.

CONCLUSION

In sum, we find that the complaint fails to state a constitutional claim against Martin insofar as it alleges supervisory liability. We conclude that the complaint also fails to state a claim against either Martin or Schlessinger insofar as it alleges that they negligently deprived Barbera of her right to life without due process of law. And we

hold that Schlessinger is not entitled to absolute immunity for his actions but is entitled to the protection of qualified immunity. Accordingly, the decision of the district court denying defendants' motion to dismiss or for summary judgment is reversed, and we remand the case with instructions to enter judgment in favor of Martin and Schlessinger.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JACQUELINE BARBERA, as Administratrix of the Goods, Chattels, and Credits of LENA MARGARET BARBERA,

Plaintiff,

-against-

84 Civ. 8624

WILLIAM FRENCH SMITH, individually and as Attorney General for the United States; JOHN S. MARTIN,JR., individually and as former United States Attorney for the Southern District of New York; and STEPHEN SCHLESSINGER, individually and as a former Assistant United States Attorney for the Southern District of New York,

Defendants.

MEMORANDUM OPINION AND ORDER

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APPEARANCES:

For Plaintiff:

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SHIRLEY WOHL KRAM, U.S.D.J.

This is an action brought under the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. Secs. 1346(b), 2671-2680, and as a Bivens claim under the Fifth Amendment to the United States Constitution pursuant to general federal question jurisdiction, 28 U.S.C. Sec. 1331. This case is presently before the court on defendants' motion to dismiss for lack

of personal jurisdiction over one of the defendants, for failure to state a claim upon which relief can be granted, for lack of subject matter jurisdiction, and on the grounds of absolute and qualified immunity pursuant to Rules 12(b)(1), (2) and (6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment pursuant to Rule 56. For the reasons set forth below, defendants' motion is granted in part and denied in part.

Facts

This action arises out of the April 1982 murders of Lena Margaret Barbera ("Barbera") and three CBS employees who had come to her aid in a rooftop parking area at Pier 92 in Manhattan.

Barbera was employed as an accountant by the Candor Diamond Corporation ("Candor"). Candor, its

employees and former President, Irwin E. Margolies ("Margolies"), were the targets of a fraud investigation conducted by the United States Attorney for the Southern District of New York, defendant John R. Martin ("Martin"), in 1981 and 1982. The Assistant United States Attorney ("AUSA") assigned to the investigation was defendant Stephen Schlessinger ("Schlessinger").

Barbera agreed to cooperate in the government's investigation of Candor sometime in 1981. As part of her cooperation agreement, Barbera pleaded guilty to a single count mail fraud information under 18 U.S.C. Sec. 1341. Barbera's arrest and sentencing were deferred by the court at Schlessinger's request because of Barbera's cooperation with the government. Schlessinger promised to recommend a non-custodial sentence as part of the

agreement.

Plaintiff, Barbera's administratrix and mother, alleges that, after Barbera began cooperating with the government, her attorney asked Schlessinger to provide Barbera with police protection and Schlessinger refused; that Schlessinger informed Margolies' attorney who, in turn, informed Margolies in December 1981 that two Candor employees one of whom was Barbera, were cooperating with the government; and that immediately thereafter Margolies hired Donald P. Nash ("Nash") to kill Barbera and Jenny Soo Chin ("Chin"), a coworker and close friend of Barbera, who Margolies wrongly assumed to be the other Candor informant.[1]

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[1]Plaintiff contends that Schlessinger was, in fact, also working with Gaye Broffman, a former Candor employee, as an informant.

In January 1982, Chin disappeared. Plaintiff alleges that, following Chin's disappearance, Barbera again askked Schlessinger for police protection and was again refused.

Barbera was murdered on April 12, 1982. Nash and Margolies subsequently were convicted of the murders of both Chin and Barbera in New York State Supreme Court in April 1983 and May 1984 respectively.

This action was filed in the United States District Court for the Eastern District of New York on July 30, 1984, against William French Smith ("Smith"), the former United States Attorney General, Martin, and Schlessinger, in both their individual and their official capacities. That court transferred this action to the Southern District of New York as the proper place of venue by consent of all

parties on November 16, 1984.

Plaintiff alleges that defendant Schlessinger's negligence in informing Margolies' attorney of Barbera's cooperation and in refusing Barbera's requests for police protection and that defendants Martin's and Smith's negligent control and supervision of Schlessinger were the proximate cause of Barbera's death. Plaintiff alleges that, as a result of defendant's negligence, defendants and the government are subject to tort liability under both the FTCA and Bivens because defendants deprived Barbera of her Fifth Amendment right to life without due process of the law.

DISCUSSION

The Claims

A. The FTCA Claim

The FTCA waives the sovereign immunity of the United States under

certain specified conditions and must be complied with strictly. See United States v. Kubrick, 444 U.S. 111, 117-18 (1979). The FTCA provides in pertinent part that

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. Sec. 2675(a).

Suit under the FTCA lies only against the United States, and the district courts lack subject matter jurisdiction over claims asserted against either federal agencies or individual federal employees. Myers & Myers,, Inc. v. United States Postal Service, 527 F.2d 1252, 1256 (2d Cir.

1975). An additional jurisdictional prerequisite to suit under the FTCA is that an administrative claim be filed with the appropriate federal agency before commencement of the district court action. O'Rourke v. Eastern Airlines, Inc., 730 F 2d 842, 855 (2d Cir. 1984).

Plaintiff has neither sued the United States nor filed an administrative claim prior to commencement of her action. As a result, plaintiff's FTCA claim must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

B. The Bivens Claim

Plaintiff brings this action on behalf of Barbera, her deceased daughter, alleging that the negligent and reckless acts of the defendants

deprived Barbera of her constitutional right to life without due process of the law in violation of the Fifth Amendment to the United States Constitution. Asserting federal question jurisdiction under 28 U.S.C. Sec. 1331(a), plaintiff seeks compensatory and punitive damages against the defendants for their alleged constitutional violations under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Bivens established that victims of a constitutional violation by a federal agent acting under color of federal law have a right to recover damages against that official in federal court. See Carlson v. Green, 446 U.S. 14, 18 (1980).[2]

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[2] A Bivens claim is analogous to a claim under the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983, which provides a remedy to victims of constitutional violations by any person

It is not disputed that defendants were federal agents who were acting under color of federal law during the conduct complained of. The issue which this Court is called on to decide is whether this conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution.[3]

Fifth Amendment guarantees include, among others, that a person will not be

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acting under color of state law. To the extent that relevant Bivens decisions were not available, this Court relied on relevant section 1983 decisions in its analysis because there is "no reason why the pleading requirements should be any different in actions against federal officials." Black v. United States, 534 F.2d 524, 528 (2d Cir. 1976).

[3]If defendants' actions rise only to the level of common law, rather than constitutional, torts, the only basis for this Court's subject matter jurisdiction is diversity of citizenship under 28 U.S.C. Sec. 1332. Because both plaintiff and defendant Martin are residents of New York, this Court lacks subject matter jurisdiction over the complaint if the complaint sounds only in common law tort.

deprived of life without due process of law. However, plaintiff can prove no deprivation of her constitutional rights in this case unless the government had a constitutional duty to protect Barbera. See Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1983).

It is settled that there is no general constitutional right to government protection from criminals or madmen and, as a result, no constitutional duty on the part of the government to provide such protection. E.g., Estate of Gilmore v. Buckley, 787 F.2d 714, 720 (1st Cir. 1986); Ellsworth v. City of Racine, 774 F.2d 182, 185 (7th Cir. 1985), cert. denied, 106 S.Ct. 1265 (1986); Fox v. Custis, 712 F.2d 84, 89 (4th Cir. 1983). However, a right and corollary duty to basic protective services may arise out of a special relationship assumed or

created by a government entity in regard to a particular person, Ellsworth v. City of Racine, 774 F.2d at 185, such as when the government itself has put an individual in danger, Escamilla v. City of Santa Ana, 796 F.2d 266, 269 (9th Cir. 1986). The contours of what constitutes a "special relationship" between citizens and the government, acting through its officers, are hazy and indistinct. Ellsworth v. City of Racine, 774 F.2d at 185.

In general, it is established that, when the government takes a person into custody or otherwise assumes responsibility for that person's welfare, a "special relationship" may be created with respect to that person, and the Constitution imposes a concomitant duty on the government to assume some measure of responsibility

for that person's safety and wellbeing. Estate of Gilmore v. Buckley, 787 F.2d at 721. Thus, it has been held that the Constitution imposes a duty on the government with respect to the safety or welfare of prison inmates, see, e.g., Estelle v. Gamble, 429 U.S. 97 (1976); children in the custody and care of state social service agencies, see, e.g., Doe v. New York City Department of Social Services, 709 F.2d 782 (2d Cir.), cert. denied, 464 U.S. 864 (1983); and persons in the care of government hospitals, see, e.g. Morrison v. Washington County, 700 F.2d 678 (11th Cir.), cert. denied, 464 U.S. 864 (1983). Estate of Gilmore v. Buckley, 787 F.2d at 721. See also Jensen v. Conrad, 470 U.S. 1052 (1985).

In Martinez v. California, 444 U.S. 277 (1980)(unanimous opinion), the Supreme Court found no constitutional

violation by parole officials where the victim was tortured and murdered by a parolee who had previously been convicted of attempted rape, five months after the parolee had been released from prison. The Court concluded that "under the particular circumstances of [that] parole decision, [the victim's] death [was] too remote a consequence of the parole officers' action" to hold them liable. Two factors appear critical to this conclusion: (1) that five months had elapsed between the state action and the loss of life, and (2) that there was no indication, nor were defendants aware, that the Martinez victim, "as distinguished from the public at large, faced any special danger." Id. at 285. However, the Court need not and does not decide that a parole officer could never be deemed to 'deprive' someone of

life by action taken in connection with the release of a prisoner on parole." Id. (emphasis added).

In Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986), the First Circuit concluded that the plaintiff's estate had not stated a cause of action against a state psychiatrist and county prison officials where the plaintiff, whose life previously had been threatened by a prison inmate, was killed by the inmate while he was a two day furlough from prison. The Court reasoned that

> The state played no part in creating the threat that Prendergast posed to Gilmore, Prendergast's murderous design was independently conceived and executed, and the state neither condoned nor encouraged his behavior. For there to be a special relationship implicating the fourteenth amendment, we believe the state must be more directly implicated than it was here in the events causing the victim's death -- as perhaps (although we need not decide), when the state, by exercising custody or control over the plaintiff, effectively strips

> her of her capacity to defend herself or affirmatively places her in a position of danger that she would not otherwise have been in. Here, the state and county defendants did not have custody or control over Gilmore, nor did they condone, ratify or in any way instigate Gilmore's homicidal encounter.

Id. at 722 (citations omitted).

In Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1986), the Seventh Circuit suggested that a municipality may have a constitutional duty to provide elementary protective services to an employee where the municipality and its employee had a "special relationship" by virtue of the nature of the employment relationship, but held that such a special relationship did not exist in that case. There, an undercover narcotics officer and his family became the targets of threats as the result of incriminating testimony which he was about to give. The City voluntarily provided police protection

to his wife for the eight hours each day that her husband was working. His wife released her bodyguard one day after both had seen a suspicious car in front of her house, and she was severely beaten and threatened shortly after her bodyguard left. She sued, claiming the City negligently failed to provide her round-the-clock protection. One of the members of that Court, concurring in the result, but not basing his conclusions on a determination that no special relationship existed, stated:

> A review of the cases suggests at least two factors to consider in deciding whether a special relationship exists. One factor that has been stressed is whether the danger which the defendant allegedly had a duty to prevent was directed at the public at large or only at a specific individual. Another factor to consider is how closely the danger to the plaintiff is linked to actions of the defendant.

Id. at 198 (Coffey, C.J., concurring).

The plaintiff alleges facts in this case which indicate that Barbera had a "special relationship" with the Offices of the United States Attorney for the Southern District of New York through her cooperation with Schlessinger such that the federal government owed her a duty to assume some measure of responsibility for her safety and well-being. It is beyond question that Barbera faced a special danger that made her distinguishable from the public at large and that defendants knew or should have known of her special status.

Barbera was cooperating in a federal investigation into the criminal activities of the man who ultimately was responsible for her murder. Although she was not directly threatened by Margolies, her co-worker disappeared shortly after Schlessinger

told Margolies' attorney that Barbera and an unnamed co-worker were cooperating with the authorities in the investigation. As a result of the disappearance of her co-worker, Barbera asked Schlessinger for and was refused police protection.

Although Schlessinger must have been aware of the special danger which Barbera faced, Barbera herself put Schlessinger on notice of her special danger by requesting protection in light of Chin's disappearance. In effect, Schlessinger placed Barbera in danger by informing Margolies' attorney that Barbera was cooperating with the authorities and then denied her the ability to defend herself by refusing her request for police protection despite the unexplained disappearance of her co-worker.

Barbera satisfies the two criteria

on which the Supreme Court relied in Martinez. First, Barbera was distinguished from the public at large and defendants were or should have been aware of her special situation because Barbera was cooperating in the Candor investigation and Schlessinger had informed Margolies' attorney of her cooperation. Second, Barbera's request for protection came shortly after Chin's disappearance and her murder occurred less than three months later while she was still cooperating in the investigation. As a result, her murder was not the remote occurrence found in the Martinez facts. Barbera also satisfies the concerns enunciated in Buckley and the Ellsworth concurrence because Schlessinger affirmatively placed Barbera in danger by informing Margolies' attorney of her cooperation in the ongoing investigation.

Barbera fits squarely within the established "special relationship" criteria. As a result, plaintiff states a cause of action pursuant to Bivens as to defendant Schlessinger,, and Schlessinger's motion to dismiss as to this claim is denied. The Court next considers whether defendants Smith and Martin are proper parties to this action.

Jurisdiction Over William French Smith

Plaintiff seeks damages from defendant William French Smith, a former United States Attorney General, based in Washington, D.C., during his tenure, in both his individual and official capacities. However, a Bivens claim can be maintained against a federal official only in his individual capacity. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. at 397. As a

result, there is no basis for any claim against Smith in his official capacity.

It is well settled that, in both diversity and federal question cases, a district court looks to state law to determine in what manner and under what circumstances a party not present in the forum state can be subjected to the jurisdiction of a federal district court. Marsh v. Kitchen, 480 F.2d 1270, 1272 n. 6 (2d Cir. 1973). Here, personal jurisdiction is assessed under New York's long arm statute which provides

> Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to

> a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> > (i) regularly does or solicits, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> >
> > (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

N.Y. Civ. Prac. Law Sec.302(a) (McKinney 1972 & Supp. 1987).

Plaintiff bears the burden of proving that the person over whom jurisdiction is asserted falls within the statute's embrace. E.g., McNutt v.

General Motors Acceptance Corp., 298 U.S. 178, 182 (1936); Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 92 (2d Cir. 1975); Louis Marx & Co. v. Fuji Seiko Co., Ltd., 453 F.Supp. 385, 389 (S.D.N.Y. 1978).

Plaintiff alleges that Smith, as Attorney General of the United States, recklessly and negligently failed to adequately train and supervise his subordinates, defendants Martin and Schlessinger, and that Smith's failure caused Barbera's death. Plaintiff's assertion of jurisdiction over Smith pursuant to Sections 302(a)(1), 302(a)(2) and 302(a)(3)(1) of New York's long arm statute is premised on the theory of agency. Plaintiff claims that Martin and Schlessinger were acting within New York State as Smith's agents for the purposes of transacting business under Section 302(a)(1),

commiting a tortious act under Section 302(a)(2), and engaging in a persistent course of conduct under Section 302(a)(3)(i).

In Grove Press, Inc. v. Angleton, 649 F.2d 121 (2d Cir. 1981), the Second Circuit rejected the district court's assertion of jurisdiction over three non-resident employees of the Central Intelligence Agency (the "CIA"), including its then Director. Jurisdiction had been asserted in that case based on a similar theory of agency, i.e., that unnamed CIA agents had committed tortious acts in New York pursuant to Section 302(a)(2) as agents for the non-resident CIA employees. Accord Marsh v. Kitchen, 480 F.2d at 1270 (where the Second circuit held that the district court had no personal jurisdiction under Sections 302(a)(1) and (2) over a non-resident AUSA based

on a similar theory of agency).

In Grove Press, the Second Circuit held that, before an agency relationship can be held to exist under New York's long arm statute, a showing must be made that the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control of, the non-resident principal. Grove Press, Inc. v. Angleton, 649 F.2d at 122. Furthermore, under New York law, it is established that New York's long arm statute does not provide jurisdiction over a defendant in his individual capacity based on an agent's tortious act within the state unless the agent was representing the defendant in his individual capacity. Green v. McCall, 710 F.2d 29, 33 (2d Cir. 1983).

Here, as in Grove Press and Marsh, defendants Martin and Schlessinger

"were simply United States employees acting as agents for the United States government." Grove Press, Inc. v. Angleton, 749 F.2d at 123. More than this is required to make a prima facie showing that Martin and Schlessinger were Smith's personal agents. Id. plaintiff here does not allege more.

Furthermore, the two cases relied on by plaintiff to assert jurisdiction over Smith are inapposite. Clark v. United States, 481 F.Supp. 1086 (S.D.N.YH. 1979), clearly is no longer good law in light of the Second Circuit's Grove Press decision. Trafalgar Capital Corp. v. Oil Producers Equipment Corp., 555 F.Supp. 305 (S.D.N.Y. 1983), is not on point because the district court there presumed the agency of two corporate officers acting in New York on behalf of their corporation.

Accordingly, defendant Smith's motion to dismiss as to him for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure is granted.

Stating a Claim as to Defendant John R. Martin

Plaintiff's complaint alleges that

> Among other things, defendant MARTIN negligently and recklessly failed properly to provide the requisite training and supervision of defendant SCHLESSINGER, which said failure resulted in the death of plaintiff's interstate and the loss to palaintiff of her daughter's services, comfort, and companionship.

Defendants argue (1) that these allegations are impermissibly vague and insufficient to state a claim against Martin upon which relief may be granted, (2) that Martin may not be held personally liable under the doctrine of respondeat superior for the action or inaction of his subordinates,

and (3) that negligent supervision does not rise to the level of a constitutional tort. Plaintiff, on the other hand, contends (1) that her averments plainly state the conduct of Martin which gave rise to the alleged constitutional violation and that nothing more is required to state a claim, (2) that plaintiff's claim is not brought under the doctrine of respondeat superior; rather, plaintiff properly seeks to hold Martin liable for his own negligent and reckless acts; and (3) that failure to supervise does create a cause of action here.

Plaintiff is obligated to make a short and plain statement of the essential elements of her claim in her complaint. Fed. R. Civ. P. 8(a). This she has done. Plaintiff is not required to set out the facts in detail, and the complaint will survive

a motion to dismiss unless it appears beyond a doubt that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983).

Furthermore, the cases cited by defendants for the proposition that more than general allegations are required to state a claim are inapposite as they pertain to the specificity required to plead conspiracy to deprive a person of constitutional rights, which is not alleged here. Nor is plaintiff's claim based on a theory of respondeat superior, and defendants' arguments to the contrary are unavailing. Plaintiff's complaint alleges only that Martin's own negligent and reckless conduct in training and supervising Schlessinger resulted in Barbera's

death.

A claim for relief under Section 1983 only need allege that some person acting under color of state law deprived the claimant of a federal right. Green v. Maraio, 772 F.2d 1013, 1016 (2d Cir. 1983). By analogy, then, a Bivens claim must allege that a federal official acting under color of federal law deprived plaintiff of a constitutional right. In addition, the claim should set forth the illegal misconduct and resultant harm in such a way as will permit an informed ruling as to whether the wrong complained of is of federal cognizance. Durso v. Rowe, 579 F.2d 1365, 1371 (7th Cir.)(quoting Duncan v. Nelson, 466 F.2d 939, 943 (7th Cir.), cert. denied, 409 U.S. 894 (1972)), cert. denied, 439 U.S. 1121 (1978). Plaintiff's complaint alleges the proper elements

for a Bivens claim and sets them forth sufficiently for this Court to determine whether the wrong complained of as to Martin rises to the level of a constitutional claim.

The law clearly allows actions against supervisors as long as sufficient causal connection is present and the plaintiff was deprived under color of law of a constitutional right. The Second Circuit recently outlined the limits of liability of a supervisory official:

> A defendant may be personally involved in a constitutional deprivation within the meaning of 42 U.S.C. Sec. 1983 in several ways. The defendant may have directly participated in the infraction, see, e.g., John v. Glick, 481 F.2d 1028, 1033-34 (2d Cir.), cert. denied, 414 U.S. 1033 (1973) (prison guard liable for beating inmate); Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972) (prison warden liable for ordering that inmate be placed in solitary confinement). A supervisory official, after learning of the violation through a report or appeal, may have failed to remedy

> the wrong, see, e.g., United States ex rel. Larkins v. Oswald, 510 F.2d 583, 589 (2d Cir. 1975). A supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue, see, e.g., McCann, supra, 698 F.2d at 125; Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir.), cert. denied, 449 U.S. 1016 (1980); Duchesne v. Sugarman, 566 F.2d 817, 830-31 (2d Cir. 1977). Lastly, a supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event, see, e.g., Wright v. McCann, 460 F.2d 126, 135 (2d Cir. 1972) (warden responsible for condition of disciplinary units at prison). Cf. Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), cert. denied, 444 U.S. 980 (1979) (municipality liable for gross negligence in training its prison guards).

Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986).

Plaintiff claims that defendant Martin's involvement in this case falls within these categories in that (1) Martin was reckless and negligent in training and supervising his subordinate Schlessinger, and (2)

Martin knew or should have known of actual or potential problems in policies or customs in the United States Attorneys Office and failed to correct them. Defendants, citing McCann v. Coughlin, 698 F.2d 112, 125 (2d Cir. 1983), contend that the requisite standard which plaintiff has failed to plead is gross negligence or deliberate indifference. McCann held that gross negligence or deliberate indifference is "an adequate basis for liability, Id. at 125 (emphasis added), not that plaintiff's pleadings had to use that precise language. Plaintiff pleads more than ordinary negligence; she pleads both negligence and recklessness. Cf. Daniels v. Williams, 106 S.Ct. 662, 663 (1986). Plaintiff also alleges Martin's failure to correct unconstitutional practices, which does not require gross negligence

as a standard. Accordingly, this Court finds that plaintiff has stated a claim under Bivens sufficient to withstand a motion to dismiss.

Neither defendants' Local Rule 3(g) Statement nor their other moving papers provide any factual allegations on the part of Martin denying, e.g., a supervisory role, knowledge of Schlessinger's activities, or that Schlessinger's actions were customary. Nor did Martin submit an affidavit in his behalf. Submittal of an affidavit putting forth facts which refute the allegations of the complaint would have provided information essential to this Court's present determinations. Because defendants have failed to provide any facts rebutting plaintiff's claims, summary judgment as to Martin is inappropriate at this time. This Court does not conclude that Martin was

personally involved in a deprivation of due process, only that, on this record, Barbera is entitled to attempt to prove that he was. Williams v. Smith, 781 F.2d at 324.

Affirmative Defenses

A. Prosecutorial Immunity

A prosecutor is absolutely immune from constitutional tort suits for any actions which are "within the scope of his prosecutorial duties." Imbler v. Pachtman, 424 U.S. 409, 420 (1976). The Imbler Court held that absolute immunity from Section 1983 liability exists for those prosecutorial activities "intimately associated with the judicial phase of the criminal process." Id. at 430. Protected "quasi-judicial activities include the initiation of a prosecution and the presentation of the government's case, id. at 431, but absolute protection

does not extend to a prosecutor's investigative or administrative ats, id. at 431 n. 33. As a result, courts are left with the difficcult chore of drawing a line separating amorphous and vague notions of "investigative" and "prosecutorial" conduct. Lee v. Willins, 617 F.2d 320, 322 (2d Cir.), cert. denied, 449 U.S. 861 (1980).

The Second Circuit has endorsed a concept of distinguishing these two types of conduct by reference to the type of harm allegedly suffered. Id.

> Under this analysis, a prosecutor is immune from a suit to recover for an injury arising solely from the prosecution itself -- e.g., being compelled to stand trial or to suffer imprisonment or pretrial detention. Such harm must always result in substantial part from the protected prosecutorial activities of initiating prosecution or presenting the state's case. Where the alleged harm is inflicted independently of the prosecution, however, absolute immunity will not attach. If, for example, a prosecutor violates the Fourth Amendment by conducting an illegal search, the victim is harmed by

> invasion of his zone of privacy, whether or not the evidence is introduced at trial. Redress for this harm is not barred by Imbler.

Id. (citations omitted).

Following this approach, the Second Circuit has held that the doctrine of absolute immunity does attach, for example, for breach of an agreement not to prosecute, Powers v. Coe, 728 F.2d 97 (2d Cir. 1984), for misconduct before a grand jury, id., for a decision to obtain a material witness order, Betts v. Richard, 726 F.2d 79 (2d Cir. 1984), for plea negotiations, Taylor v. Kavanaugh, 640 F.2d 450 (2d Cir. 1981), for failure to live up to the plea agreement, id., for falsifying evidence, Lee v. Willins, 617 F.2d at 320, and for coercing perjured testimony, id. On the other hand, "[t]he 'investigative' and 'administrative' work involved in testifying before a grand jury,

accumulating evidence, and disseminating information to the press is analogous to the tasks performed by the police, and therefore only the same qualified 'good faith' immunity is available." Taylor v. Kavanaugh, 640 F.2d at 453.

In Maglione v. Briggs, 748 F. 2d 116 (2d Cir. 1984) (per curiam), the Second Circuit affirmed the grant of summary judgment to the defendant prosecutor on the grounds of absolute immunity, but noted that

> the complaint also alleged that Briggs was "in charge of the investigations" of the felony charge, suggesting that he was performing investigatory functions apart from the grand jury inquiry. If there were facts to support this conclusory description of Briggs' role, the case might fall within the narrow area that Imbler left unresolved, see 424 U.S. at 430, 96 S.Ct. at 995; Taylor, 640 F.2d at 452. However, Maglione has not specified any facts or circumstances to support this claim. When Judge Miner repeatedly asked counsel to describe Briggs' actions, counsel for Maglione merely replied that

> Briggs had acted in bad faith. Since it is Briggs' conduct rather than his state of mind that is in issue, summary judgment was properly granted.

Id. at 118.

It appears, then, that the Second Circuit does not follow the Ninth Circuit's position, relied on by defendants in their argument that "[i]nvestigative functions carried out pursuant to the preparation of a prosecutor's case also enjoy absolute immunity." Freeman v. Hittle, 708 F.2d 443 (9th Cir. 1983) (per curiam).

It is clear that the alleged conduct attributed to defendant Martin is not protected by the absolute immunity doctrine because training and supervision are administrative functions to which absolute immunity will not attach. Whether Schlessinger is protected by the absolute immunity doctrine is less clear cut. The

actions which form the basis of the complaint include Schlessinger's refusal to provide police protection to Barbera and his disclosure to Margolies' attorney that Barbera was cooperating in the Candor investigation.

Schlessinger states in his unsworn affirmation that

> All of my conversations with Margaret Barbera and various attorneys representing her in 1981 and 1982 were in connection with, and leading up to, her plea agreement and the cooperation in the Candor Diamond investigation that was required as part of that agreement. Similarly, any conversations I had with any attorney representing Irwin Margolies were in connection with the potential prosecution of Margolies.

In effect, Schlessinger affirms that his refusal to provide police protection to Barbera occurred as part of both plea negotiations and the Candor investigation. The Second Circuit has held plea negotiations to

be protected by the doctrine of absolute immunity, Taylor v. Kavanaugh, 640 F.2d at 450, but has suggested that prosecutorial investigations are not, Lee v. Willins, 617 F.2d at 322. Schlessinger's conversations with Margolies' attorney clearly occurred as part of Schlessinger's investigation.

Applying the Lee v. Willins approach to determine the type of conduct involved here resolves the dilemma and demonstrates that Schlessinger's conduct was of an investigative nature from which he is not absolutely immune. The injury involved, namely Barbera's death, did not arise "solely from the prosecution itself," it allegedly arose from defendants' breach of the government's duty to protect Barbera in light of her special relationship and in violation of the due process clause of the Fifth Amendment. Barbera was

harmed allegedly because she was denied her right to due process. Pursuant to the Second Circuit's holding in Lee v. Willins, "[r]edress for this harm is not barred by Imbler." Id., 617 F.2d at 322.

Furthermore, this result is not inconsistent with the Second Circuit's holding in Taylor v. Kavanaugh, 640 F.2d at 450, that plea negotiations are protected by the doctrine of absolute immunity. Applying the rule of Lee v. Willins to the Taylor case, the injury suffered as a result of the breach of that plea agreement arose solely from the prosecution, and therefore absolute immunity attached. Because applicaton of the rule of Lee v. Williams to the Barbera action does not lead to the same conclusion, Taylor should not be read to suggest a different result here.

Accordingly, defendants Martin and Schlessinger are not covered by the doctrine of absolute immunity in this case, and the government's motions to dismiss or for summary judgment as to them on this ground are denied.

B. Qualified Immunity

Good faith or qualified immunity is an affirmative defense in a Bivens action. Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983). Plaintiff's claims may be dismissed on grounds of qualified immunity if defendants show that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In other words, the conduct must be reasonable when viewed objectively. Wyler v. United States, 725 F.2d at 159.

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly esablished law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the offense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense should turn primarily on objective factors.

Harlow v. Fitzgerald, 457 U.S. at 818-19 (footnote omitted).

The Harlow Court refashioned the qaualified immunity doctrine to permit

resolution of many insubstantial claims on summary judgment and to avoid subjeccting government officials either to the costs of trial or the burdens of discovery in cases where the legal norms the officials were alleged to have violated were not clearly established at the time. Mitchell v. Forsyth, 105 S.Ct. 1806, 2815-16 (1985). Unless plaintiff's allegations state a claim of violation of clearly established law, defendants pleading qualified immunity, as Martin and Schlessinger do here, are entitled to dismissal before the commencement of discovery. Id. at 2816. The effect of Harlow is to permit summary judgment on the issue of qualified immunity in any case where the material facts are not in dispute. Pollnow v. Glennon, 757 F.2d 496, 501 (2d Cir. 1985).

In the case at hand, the

determination of whether summary judgment on grounds of qualified immunity is appropriate for either Martin or Schlessinger turns on whether the special relationship doctrine or other government policies were clearly established in late 1981 and early 1982 such that a reasonable person would have known of the government's concomitant duty to protect Barbera.

The current debate over affirmative duty and constitutional tort stems in large part from a prisoner petition case, Estelle v. Gamble, 429 U.S. 97 (1976), decided by the Supreme Court in 1976. Jensen v. Conrad, 747 F.2d at 10. The first major post-Estelle decision, Martinez v. California, 444 U.S. 277 (1980), was decided by the Supreme Court in 1980. Id. at 192. Martinez established the major criteria for determining when the doctrine may

apply. In May 1981, the Second Circuit held that the government could violate a constitutionally protected liberty or property interest by failing to protect an individual who had been placed in the government's custody or care. Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981).

Furthermore, the government itself has enacted laws regarding witness protection under certain circumstances -- which are inapplicable to the Barbera facts. For example, Congress, aware that threats of retaliation were discouraging government witnesses from testifying against participants in organized crime, passed Title V of the Organized Crime Control Act of 1970. This law authorized the United States Attorney General to provide for the protection and subsistence of persons who might testify for the government at

the trials of organized crime figures. It has an exceptional record for safeguarding its participants. See Doe v. Civiletti, 635 F.2d 88, 89 (2d Cir. 1980). While not directly applicable here, such laws demonstrate the government's general awareness of the special dangers which can be involved in cooperation with government investigations and the government's affirmative provision of protection under appropriate circumstances many years before the Barbera murder.

As a result, it is not likely that the Office of the United States Attorney for the Southern District of New York was unaware of the special relationship doctrine, and the government's concomitant duty to protect that person's wellbeing, or of the potential danger a person cooperatiing in a government

investigation might face.

In light of Barbera's cooperation with the government, Schlessinger's provision of this information to Margolies' attorney, Chin's disappearance, the government's general awareness of the potential risks attendant to cooperation with the government on criminal investigations, and the state of development of the "special relationship" doctrine at the time of Barbera's death, it cannot be said that either Martin's or Schlessinger's conduct necessarily was objectively reasonable under these circumstances. Nor have either Martin or Schlessinger made any showing of extraordinary circumstances; nor has Martin made a showing that he neither knew nor should have known of the relevant legal standard, as is required by the rule of Harlow.

Accordingly, absent any affirmative showing whatsoever by either Martin or Schlessinger that such was not the case in late 1981, qualified immunity is not available to either of them at this stage of the litigation.

CONCLUSIONS

The claims against William French Smith are dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. That portion of plaintiff's claim brought pursuant to the Federal Tort Claims Act, 28 U.S.C. Secs. 1346(b), 2671 et seq., are dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Defendants Martin's and Schlessinger's motions to dismiss or, in the alternative, for summary judgment to Rules 12(b)(6) and 56 of the Federal

Rules as to the Bivens claim are denied.

This Court is of the opinion that this Order involves controlling questions of law concerning the "special relationship" doctrine and the doctrines of absolute and qualified immunity and that an immediate appeal from this Order would materially advance the ultimate termination of the litigation. Accordingly, the Court certifies these portions of its Order to the Court of Appeals for the Second Circuit. Pursuant to 28 U.S.C. Sec. 1292(b), application for such appeal must be made within ten days after entry of this Order. Further proceedings in this Court are stayed pending appeal.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York, 2/9/87

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of December, one thousand nine hundred and eighty-seven.

Present: HON. WILFRED FEINBERG, Chief Judge

HON. LAWRENCE W. PIERCE,

HON. FRANK X. ALTIMARI,

Circuit Judges,

JACQUELINE BARBERA, as Administratrix of the Goods, Chattels, and Credits of Lena Margaret Barbera,

Plaintiff-Appellee,

Docket Nos. 87-6054 87-6098

-v.-

WILLIAM FRENCH SMITH, individually and as the former Attorney General of the United States; JOHN S. MARTIN, JR., individually and as the former United States Attorney for the Southern District of New York; and STEPHEN SCHLESSINGER, individually and as a former Assistant United States Attorney for the

Southern District of New York,

Defendants,

JOHN S. MARTIN, JR., and STEPHEN SCHLESSINGER,

Defendants-Appellants.

Issued as Mandate 2/25/88

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcipt of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
CLERK

BY: EDWARD J. GUARDARO,
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of February, one thousand nine hundred and eighty-eight.

JACQUELINE BARBERA, as Administratrix of the Goods, Chattels and Credits of LENA MARGARET BARBERA,

Plaintiff-Appellee,

Docket No.
87-6054
87-6098

-v-

WILLIAM FRENCH SMITH, individually and as Attorney General of the United States; JOHN S. MARTIN, JR., individually and as former United States Attorney for the Southern District of New York; and STEPHEN SCHLESSINGER, individually and as a former Assistant United States Attorney for the Southern District of New York,

Defendants,

JOHN S. MARTIN, JR., and STEPHEN SCHLESSINGER,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee - JACQUELINE BARBERA.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
CLERK

SUPREME COURT OF THE UNITED STATES

No. A-860

JACQUELINE BARBERA, ETC.,

v.

WILLIAM FRENCH SMITH, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 14, 1988.

s/Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 10th day
of May, 1988.

(2)

No. 87-2034

In the Supreme Court of the United States

OCTOBER TERM, 1988

JACQUELINE BARBERA, PETITIONER

v.

STEPHEN SCHLESSINGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2034

JACQUELINE BARBERA, PETITIONER

v.

STEPHEN SCHLESSINGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the court of appeals' holding that her constitutional tort claim against respondent is barred by the doctrine of qualified immunity.

1. Petitioner's decedent was cooperating with federal authorities in a criminal investigation when she was abducted and murdered at the instigation of the target of the investigation. Petitioner thereafter brought this action against respondent, a former Assistant United States Attorney, and two other defendants, former Attorney General William French Smith and former United States Attorney John S. Martin, Jr. Petitioner sued the defendants in both their individual and official capacities, seeking damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, and the constitutional tort doctrine of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed (Pet. App. 22a-24a) petitioner's FTCA claim because it had not been brought in accordance with the

requirements of the FTCA. The court also dismissed (*id.* at 37a-44a) petitioner's *Bivens* claim against former Attorney General Smith for lack of personal jurisdiction.

Petitioner's *Bivens* claim against the remaining two defendants alleged that respondent and Martin had violated the decedent's right to life under the due process clause by recklessly revealing the fact that she was a cooperating witness and then failing to provide her with police protection. Respondent and Martin moved to dismiss the suit on the grounds that petitioner had failed to state a constitutional claim. The district court denied the motion. The court held (Pet. App. 27a-28a) that, although "there is no general constitutional right to government protection from criminals or madmen and, as a result, no constitutional duty on the part of the government to provide such protection," nonetheless "a right and corollary duty to [provide] basic protective services may arise out of a special relationship assumed or created by a government entity in regard to a particular person * * * such as when the government itself has put an individual in danger." The court acknowledged (*id.* at 28a) that the contours of this "special relationship" were "hazy and indistinct" but nonetheless concluded (*id.* at 35a-37a) that the decedent had such a special relationship with the defendants insofar as she was a cooperating witness placed in danger by the fact that the defendants divulged her cooperation. The court further held (*id.* at 60a-67a) that petitioner's claim was not barred by either absolute prosecutorial immunity (see *Imbler* v. *Pachtman*, 424 U.S. 409, 420 (1976)) or qualified immunity (see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)).

2. The district court (Pet. App. 68a) certified for interlocutory appeal under 28 U.S.C. 1292(b) the issues of whether petitioner had stated a cause of action and

whether respondent and Martin were entitled to immunity. The court of appeals, after granting the requisite permission to appeal (Pet. App. 3a), reversed and remanded the case with instructions to enter judgment for respondent and Martin (*id.* at 15a). The court held (*id.* at 6a), first, that petitioner had failed to state a claim against defendant Martin because the complaint failed to plead any facts demonstrating either personal involvement in the actions allegedly leading to decedent's death or any facts demonstrating reckless supervision within the United States Attorney's office.[1]

The court of appeals, while noting (Pet. App. 7a) that this Court in *Daniels* v. *Williams*, 474 U.S. 327, 334 n.3 (1986), had "explicitly left open the question of whether grossly negligent or reckless conduct would be sufficient to allege a constitutional violation," found it unnecessary to decide whether petitioner had stated a cause of action against respondent. Instead, the court concluded (Pet. App. 12a-14a) that respondent was entitled to qualified immunity because at the time he acted there was no clearly established constitutional right to police protection in the circumstances of this case.[2] The court "express[ed] no opinion on how this question would be resolved based on the caselaw as it exists today" (*id.* at 14a). The court stated (*ibid.*), however, that "[i]n 1981-82, it would have been speculative, at best, to conclude that [decedent] was entitled to police protection, or that the government was otherwise obliged to safeguard her from those against whom she was going to testify."

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[1] Petitioner does not seek review of the court of appeals' disposition of her claims against defendant Martin (see Pet. 12).

[2] The court concluded (Pet. App. 12a) that "[t]he conduct in this case was not sufficiently linked to the court-related duties of a prosecutor to entitle [respondent] to absolute immunity."

3. In *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), slip op. 4-5, this Court noted that in order to defeat a government official's assertion of qualified immunity in a case seeking damages for an alleged violation of a constitutional right, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. * * * [I]n the light of preexisting law the unlawfulness must be apparent." The court of appeals properly concluded (Pet. App. 14a) that the unlawfulness of respondent's alleged conduct was "speculative, at best" and, thus, far from "apparent" in 1982.

In *Estelle* v. *Gamble*, 429 U.S. 97, 103-105 (1976), this Court stated that deliberate indifference to serious medical needs of prisoners would violate the Eighth Amendment based on "the government's obligation to provide medical care for those whom it is punishing by incarceration." In *Martinez* v. *California*, 444 U.S. 277 (1980), however, this Court declined to extend the reasoning of *Estelle* to the non-custodial situation of a person murdered by a paroled prisoner five months after his release. While the Court did "not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole" (444 U.S. at 285 (footnote omitted)), it did hold under the particular circumstances that the murder was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law" (*ibid.*).

The rationale of *Estelle* was extended by the Second Circuit in *Doe* v. *New York City Dep't of Social Services*, 649 F.2d 134 (1981), cert. denied, 464 U.S. 864 (1983), to persons not within the government's immediate physical control. In that case, the court held that the government had assumed a duty of care to a child that it placed in foster

care. But *Doe* still involved a custodial relationship, in which the government had custody, though not immediate physical control over, the child. As the Second Circuit noted in this case, there was in 1981 and 1982 an "absence of any significant caselaw on governmental duties arising from non-custodial relationships" (Pet. App. 13a).[3]

The issue of the existence and scope of a constitutional duty to protect a citizen in the absence of a custodial relationship is currently before the Court in *Deshaney* v. *Winnebago County Dep't of Social Services*, cert. granted, No. 87-154 (Mar. 21, 1988), in which the Court is reviewing the Seventh Circuit's holding that a state social services agency is under no constitutional duty to protect a child from abuse by his father, although the agency had reason to believe that the child was in danger. The Court's decision in that case may establish whether there is a constitutional right to protection in a non-custodial relationship,

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[3] *White* v. *Rochford*, 592 F.2d 381 (7th Cir. 1979), and *Wagar* v. *Hasenkrug*, 486 F.Supp. 47 (D. Mont. 1980), upon which petitioner relies (Pet. 15), both involved custodial relationships, at least indirectly. In *Wagar*, the police first arrested an intoxicated individual, thereby arguably assuming a duty of care for his condition under *Estelle*, and then simply left him outdoors where he died from pancreatitis. In *White*, the police arrested the driver of an automobile and then left the children accompanying him alone in the car without making any provision for them. Arguably, when the police arrested the man, they assumed a duty of care for the children analogous to that in *Doe*. The Seventh Circuit has repeatedly distinguished *White* and ruled for the defendants in subsequent cases not involving custodial relationships. See, *e.g.*, *Archie* v. *City of Racine*, No. 86-1783 (May 23, 1988) (en banc); *Ellsworth* v. *City of Racine*, 774 F.2d 182 (1985), cert. denied, 475 U.S. 1047 (1986); *Jackson* v. *Byrne*, 738 F.2d 1443 (1984); *Beard* v. *O'Neal*, 728 F.2d 894, cert. denied, 469 U.S. 825 (1984); *Bowers* v. *DeVito*, 686 F.2d 616 (1982). Thus, it can hardly be said that the decision in *White* "clearly established" the rights in question here.

but it will not alter the fact that in 1981 petitioner's decedent did not have a "clearly established" constitutional right to such protection. Indeed, the fact that the Court has found it necessary to decide the issue indicates that the right in question has not been established even today, much less clearly established.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60574